NO. 14-8913

IN THE SUPREME COURT OF THE UNITED STATES

SAUL MOLINA-MARTINEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In United States v. Olano, 507 U.S. 725 (1993), the Court held that, in order to secure relief under plain-error review pursuant to Federal Rule of Criminal Procedure 52(b), a defendant must show that the error affected his substantial rights, which "in most cases [ ] means that the error must have been prejudicial[, i.e.,] [i]t must have affected the outcome of the district court proceedings." Id. at 734 (citations omitted). The Court, however, declined to "decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial,'" id. at 735 (citations omitted); and the Court suggested that "[some] errors [ ] should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice." Id.

Since that time, at least two circuits have, in connection with errors in the application of the United States Sentencing Guidelines, adopted the very sort of presumption suggested in Olano: that is, they presume an effect on substantial rights when an error results in the application of an erroneous Guideline range to a criminal defendant. See United States v. Sabillon-Umana, 772 F.3d 1328, 1333-34 (10th Cir. 2014); United States v. Knight, 266 F.3d 203, 207-10 (3d Cir. 2001). In this case, however, the Fifth Circuit rejected such a presumption as foreclosed by its prior decisions. See United States v. Molina-Martinez, 588 Fed. Appx. 333, 334 n.1 (5th Cir. 2014) (unpublished).

In light of the foregoing, the question presented is as follows:

> Where an error in the application of the United States Sentencing Guidelines results in the application of the wrong Guideline range to a criminal defendant, should an appellate court presume, for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b), that the error affected the defendant's substantial rights?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS v

PRAYER 1

OPINION BELOW 1

JURISDICTION 1

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED 2

STATEMENT OF THE CASE 3

A. Course of proceedings 3

B. Statement of relevant facts 3

1. Sentencing. 3

2. Appeal. 5

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT 9

REASONS FOR GRANTING THE WRIT 10

The federal circuits are divided respecting the proper application of the third prong of plain-error review (the "affected substantial rights" prong) to plain errors resulting in the application of the wrong Sentencing Guideline range to a criminal defendant. At least the Third and the Tenth Circuits presume

that such errors affected a defendant's substantial rights, whereas at least the Fifth Circuit has declined to adopt such a presumption. Because the application of the third prong of plain-error review to Guideline calculation errors is an important and frequently recurring question in the federal courts of appeals, the Court should grant certiorari in this case to resolve that division. 10

A. Introduction. 10

B. The reasoning supporting the application of a presumption of prejudice in this context is compelling. 11

1. The Third Circuit's decision in Knight. 12

2. The Tenth Circuit's decision in Sabillon-Umana. 14

C. The Court should grant certiorari to resolve the circuit split over whether a plain Guideline error that results in the application of an incorrect Guideline range should be presumed to have affected the defendant's substantial rights. 15

CONCLUSION 19

APPENDIX: Westlaw version of the opinion of the Court of Appeals in United States v. Molina-Martinez, 588 Fed. Appx. 333 (5th Cir. Dec. 17, 2014) (unpublished) 20

TABLE OF CITATIONS

Page

CASES

Peugh v. United States, 133 S. Ct. 2072 (2013) 14, 16

United States v. Baretz, 411 F.3d 867
(7th Cir. 2005) 14

United States v. Blocker, 612 F.3d 413
(5th Cir. 2010) 17

United States v. Booker, 543 U.S. 220 (2005) 13-15

United States v. Del Campo-Ramirez, 379 Fed. Appx. 405
(5th Cir. 2010) (unpublished) 17

United States v. Ford, 88 F.3d 1350
(4th Cir. 1994) 13

United States v. Jasso, 587 F.3d 706
(5th Cir. 2009) 17

United States v. Jones, 596 F.3d 273
(5th Cir. 2010) 17

United States v. Knight, 266 F.3d 203
(3d Cir. 2001) ..... *passim*

United States v. Lavoie, 19 F.3d 1102
(6th Cir. 1994) 13

United States v. Leonard, 157 F.3d 343
(5th Cir. 1998) 11

Page

CASES - (Cont'd)

United States v. Mares, 402 F.3d 511
(5th Cir. 2005) 16

United States v. Martinez-Rios, 143 F.3d 662
(2d Cir. 1998) 13

United States v. Molina-Martinez, 588 Fed. Appx. 333
(5th Cir. 2014) (unpublished) ..... i, iv, 3, 7-8, 11

United States v. Olano, 507 U.S. 725 (1993) ..... i, 10-12, 17

United States v. Osuna, 189 F.3d 1289
(10th Cir. 1999) 13

United States v. Plaza-Garcia, 914 F.2d 345
(1st Cir. 1990) 13

United States v. Porter, 413 Fed. Appx. 526
(3d Cir. 2011) 14

United States v. Regalado-Flores, 236 Fed. Appx. 979
(5th Cir. 2007) 11

United States v. Robinson, 20 F.3d 270
(7th Cir. 1994) 13

United States v. Sabillon-Umana, 772 F.3d 1328
(10th Cir. 2014) ..... i, iv, 11, 14-16

United States v. Sanchez-Medina, 71 Fed. Appx. 395
(5th Cir. 2003) 11

Page

CASES - (Cont'd)

United States v. Slade, 631 F.3d 185
(4th Cir. 2011) 14

United States v. Story, 503 F.3d 436
(6th Cir. 2007) 14

United States v. Sweet, 579 Fed. Appx. 277
(5th Cir. 2014) (unpublished) 17

United States v. Syme, 276 F.3d 131
(3d Cir. 2002) 13

United States v. Vargem, 747 F.3d 724
(9th Cir. 2014) 14

United States v. Wallace, 32 F.3d 1171
(7th Cir. 1994) 13

United States v. Weaver, 161 F.3d 528
(8th Cir. 1998) 13

United States v. Wernick, 691 F.3d 108
(2d Cir. 2012) 14

United States v. Wheeler, 322 F.3d 823
(5th Cir. 2003) 11

United States v. Wood, 486 F.3d 781
(3d Cir. 2007) 14

TABLE OF CITATIONS - (Cont'd)

Page

STATUTES AND RULES

8 U.S.C. § 1326(a) 3

8 U.S.C. § 1326(b) 3

18 U.S.C. § 3231 9

28 U.S.C. § 1254(1) 1

Fed. R. Crim. P. 52(b) ..... i, 2, 10

Sup. Ct. R. 13.1 1

SENTENCING GUIDELINES

USSG § 4A1.1(a) 4, 6

USSG § 4A1.1(c) 4, 6

USSG § 4A1.1(d) 4,6

USSG § 4A1.1(e) 4-6

USSG § 4A1.1(c)(1) 4, 6

USSG § 4A1.2(a)(2) 5

MISCELLANEOUS

Petition for Certiorari, United States v. Marcus, No. 08-1341 (May 1, 2009), cert. granted, 558 U.S. 945 (2009), decision below reversed, 560 U.S. 258 (2010) 18

PRAYER

Petitioner Saul Molina-Martinez respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on December 17, 2014.

OPINION BELOW

On December 17, 2014, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. The Westlaw version of the Fifth Circuit's opinion is reproduced in the appendix to this petition.

JURISDICTION

On December 17, 2014, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. This petition is filed within 90 days of that date and therefore is timely. See Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The question presented involves Federal Rule of Criminal Procedure 52(b), which provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

STATEMENT OF THE CASE

A. Course of proceedings.

Petitioner Saul Molina-Martinez ("Mr. Molina-Martinez") pleaded guilty to an indictment charging him with being found unlawfully present in the United States after deportation, in violation of 8 U.S.C. § 1326(a) and (b). The district court sentenced Mr. Molina-Martinez to 77 months' imprisonment and three years of supervised release.

On March 18, 2013, Mr. Molina-Martinez filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. On December 17, 2014, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. Molina-Martinez, 588 Fed. Appx. 333, 335 (5th Cir. 2014) (unpublished) (Appendix).

B. Statement of the relevant facts.

1. Sentencing.

After Mr. Molina-Martinez's plea, the court ordered that a presentence report ("PSR") be prepared to assist the court in sentencing Mr. Molina-Martinez. In calculating the United States Sentencing Guidelines ("USSG") applicable to Mr. Molina-Martinez, the PSR calculated a total offense level of 21.

The PSR then calculated Mr. Molina-Martinez's criminal history score under the Guidelines, in the following manner:

Date of sentence	Offense and sentence	USSG §	Points	PSR ¶
3/6/02	Speeding/no driver's license: 18 days' custody	4A1.2(c)(1)	0	24
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(a)	3	25
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(e)	1	26
1/19/07	Illegal entry into the United States: time served (about 2 days)	4A1.1(c)	1	27
4/7/11	Aggravated burglary/theft of property over $1,000: 8 years' custody/2 years' custody	4A1.1(a)	3	28
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(a)	3	29
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	1	30
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(a)	1	31
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(a)	3	32
	On parole at the time of the commission of the instant offense	4A1.1(d)	2	34
Criminal history total			**18**	35

And, of course, with 18 criminal history points, Mr. Molina-Martinez fell into Criminal History Category VI, which with a total offense level of 21, produced a

Guideline imprisonment range of 77 to 96 months.

Mr. Molina-Martinez did not object to the PSR's criminal history scoring. The district court ultimately sentenced Mr. Molina-Martinez to 77 months' imprisonment, at the bottom of the Guideline imprisonment range calculated by the PSR.

2. Appeal.

On appeal, Mr. Molina-Martinez argued that the district court had plainly erred in scoring his criminal history under the Guidelines. Particularly, he argued that under the "single sentence" rule of USSG § 4A1.2(a)(2),[1] his Guideline criminal history score should have been calculated as follows (with lined-out text indicating where the district court had erred in its scoring):

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[1] The Sentencing Guidelines provide that prior sentences received on the same day count as but a single sentence, unless they are separated by an intervening arrest:

> If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from the offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also § 4A1.1(e).

USSG § 4A1.2(a)(2).

Date of sentence	**Offense and sentence**	**USSG §**	**Points**	**PSR ¶**
3/6/02	Speeding/no driver's license: 18 days' custody	4A1.2(c)(1)	0	24
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(a)	3	25
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(e)	1	26
1/19/07	Illegal entry into the United States: time served (about 2 days)	4A1.1(c)	1	27
4/7/11	Aggravated burglary/theft of property over $1,000: 8 years' custody/2 years' custody	4A1.1(a)	3	28
4/7/11	Aggravated burglary: 8 years' custody	~~4A1.1(a)~~ 4A1.1(e)	~~3~~ 1	29
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	1	30
4/7/11	Aggravated burglary: 8 years' custody	~~4A1.1(a)~~ 4A1.1(e)	~~1~~ 0	31
4/7/11	Aggravated burglary: 8 years' custody	~~4A1.1(a)~~ 4A1.1(e)	~~3~~ 0	32
	On parole at the time of the commission of the instant offense	4A1.1(d)	2	34
Criminal history total			~~18~~ 12	

With a total of 12 criminal history points, Mr. Molina-Martinez should have been placed in Criminal History Category V, not Criminal History Category VI. Moreover, his

Guideline imprisonment range should have been 70 to 87 months, not the range of 77 to 96 months used by the district court.

Before the Fifth Circuit, the government conceded that the district court had indeed erred as set out above, and that this error was "plain." See Molina-Martinez, 588 Fed. Appx. at 334; see also Gov't C.A. Br. 10, 13-16. The government nevertheless contended that Mr. Molina-Martinez was not entitled to relief because he had not shown an effect on his substantial rights, see Gov't C.A. Br. 10-11, 16-20, and because he had likewise not shown a serious effect on the fairness, integrity, or public reputation of judicial proceedings. See Gov't C.A. Br. 11-12, 21-22.

The Fifth Circuit agreed that Mr. Molina-Martinez "ha[d] shown a plain or obvious error in the criminal history calculation." Molina-Martinez, 588 Fed. Appx. at 334. The Fifth Circuit, however, found that Mr. Molina-Martinez had not shown that the error affected his substantial rights. See id. at 334-35. Because the correct Guideline range (70 to 87 months) overlapped with the incorrect range (77 to 96 months), and because Mr. Molina-Martinez was sentenced within the overlap (to 77 months' imprisonment), the Fifth Circuit applied its rule that Mr. Molina-Martinez had to come forward with "additional evidence" that his substantial rights were affected. See id. at 335. Finding that Mr. Molina-Martinez had not adduced such "additional evidence,"[2] the Fifth Circuit

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[2] Mr. Molina-Martinez argued that there was such "additional evidence" here in that (1) he received the low end of what the district court believed to be the Guideline imprisonment range, notwithstanding the fact that the government asked for the high end; and (2) the parties' arguments

affirmed the judgment of sentence. See id.

Along the way, "Mr. Molina-Martinez preserve[d] for possible further review his contention that an error that alters the Guideline range should be ***presumed*** prejudicial, even where the sentence actually imposed falls within the correct Guideline range." Pet. C.A. Br. 17 n.6 (emphasis in original; citing United States v. Knight, 266 F.3d 203, 207-10 (3d Cir. 2001)). In its opinion, the Fifth Circuit recognized this argument, but noted that it was foreclosed by Fifth Circuit precedent. See Molina-Martinez, 588 Fed. Appx. at 334 n.1.

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respecting the sentence were firmly anchored in the Guideline. See Pet. C.A. Br. 17-18; Pet. C.A. Reply Br. 3-7. The Fifth Circuit, however, rejected that argument. See Molina-Martinez, 588 Fed. Appx. at 335.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

The federal circuits are divided respecting the proper application of the third prong of plain-error review (the "affected substantial rights" prong) to plain errors resulting in the application of the wrong Sentencing Guideline range to a criminal defendant. At least the Third and the Tenth Circuits presume that such errors affected a defendant's substantial rights, whereas at least the Fifth Circuit has declined to adopt such a presumption. Because the application of the third prong of plain-error review to Guideline calculation errors is an important and frequently recurring question in the federal courts of appeals, the Court should grant certiorari in this case to resolve that division.

A. Introduction.

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). In United States v. Olano, 507 U.S. 725 (1993), this Court held that, in order to secure relief under plain-error review pursuant to Rule 52(b), a defendant must show that the error affected his substantial rights, which "in most cases [ ] means that the error must have been prejudicial[, i.e.,] [i]t must have affected the outcome of the district court proceedings." Id. at 734 (citations omitted). The Court, however, declined to "decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial,'" id. at 735 (citations omitted); and the Court suggested that "[some] errors [ ] should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice." Id.

Since that time, at least two circuits have, in connection with errors in the

application of the United States Sentencing Guidelines, adopted the very sort of presumption suggested in Olano: that is, they presume an effect on substantial rights when an error results in the application of an erroneous Guideline range to a criminal defendant. See United States v. Sabillon-Umana, 772 F.3d 1328, 1333-34 (10th Cir. 2014); United States v. Knight, 266 F.3d 203, 207-10 (3d Cir. 2001). In this case, however, the Fifth Circuit rejected such a presumption as foreclosed by its prior decisions.[3] See United States v. Molina-Martinez, 588 Fed. Appx. 333, 334 n.1 (5th Cir. 2014) (unpublished).

As will be demonstrated, compelling reasons support the presumption of prejudice applied by (at least) the Third and the Tenth Circuits in this context. Because the Fifth Circuit has refused to adopt such a presumption, this Court should grant certiorari in this case to resolve this division and, along the way, generally to clarify how the "affected substantial rights" prong of plain-error review should be applied.

B. The reasoning supporting the application of a presumption of prejudice in this context is compelling.

The two principal expositors of the reasons for adopting a presumption of prejudice in this context are the Third Circuit in Knight and the Tenth Circuit in Sabillon-Umana,

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[3] See, e.g., United States v. Regalado-Flores, 236 Fed. Appx. 979, 981 n.1 (5th Cir. 2007) (unpublished) (presumption of prejudice foreclosed by United States v. Wheeler, 322 F.3d 823, 828 n.1 (5th Cir. 2003)); United States v. Sanchez-Medina, 71 Fed. Appx. 395, 395-96 (5th Cir. 2003) (unpublished) (presumption of prejudice foreclosed by Wheeler and United States v. Leonard, 157 F.3d 343, 346 (5th Cir. 1998)).

although each opinion also claims at least implicit support from a number of other circuits. Because those opinions well explain the rationale for adopting such a presumption, each will be discussed in some detail.

1. The Third Circuit's decision in *Knight*.

In Knight, as in this case, the Third Circuit confronted a plain error in the calculation of the defendant's Guidelines Criminal History Category. See Knight, 266 F.3d at 205. As a result, "the correct Guideline range for Knight was 140 to 175 months, rather than the range of 151 to 188 months applied by the District Court." Id. However, the defendant had been sentenced to 162 months of imprisonment, which fell into both the erroneous range and the correct range. See id. The Third Circuit characterized the appeal as "turn[ing] on whether application of an incorrect guideline range resulting in a sentence that is also within the correct range affects substantial rights," and "h[e]ld that it presumptively does." Id. at 207.

The Third Circuit held that errors resulting in an incorrect Guideline sentencing range were among those that should be presumed prejudicial as suggested in Olano, 507 U.S. at 735, because,

> [f]irst, it is beyond cavil that the Guidelines are intended to, and do, affect sentencing. Indeed, that is their very raison d'être. Second, absent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the impact of an erroneous Guidelines range.

Id. at 207 (footnote omitted). For these reasons, the Knight court "conclude[d] that an

error in application of the Guidelines that results in use of a higher sentencing range should be presumed to affect the defendant's substantial rights." Id.

The Third Circuit noted that its rule was "in accord with decisions of several of [its] sister Courts of Appeals, which effectively (albeit not explicitly) apply a similar presumption," id. at 208, and it cited decisions from the First, Second, Fourth, Sixth, Eighth, and Tenth Circuits.[4] See id. at 208-09. Significantly, it considered, but rejected, the less defendant-friendly rule applied by, among others, the Fifth Circuit:

> We believe these cases provide too little protection for the substantial right at issue, and that the rule which we follow today better effectuates the Guidelines' purpose to institute fair and uniform sentencing. A defendant has a right to a sentence that not only falls within a legally permissible range, but that was imposed pursuant to correctly applied law. Because imposition of a sentence selected from the wrong range is likely to impair a defendant's right to a fair sentence, we believe it is appropriate under plain error analysis to remand for sentencing under the correct range notwithstanding a defendant's inability to establish that his separate right to receive a sentence within the applicable guideline range was also impaired.

Id. at 210 (footnotes and citations omitted). See also, e.g., United States v. Syme, 276 F.3d 131, 158 (3d Cir. 2002) (applying rule of Knight).

To be sure, both Knight and Syme were decided under the mandatory Guidelines regime that prevailed before this Court's decision in United States v. Booker, 543 U.S.

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[4] Particularly, the Third Circuit cited: United States v. Plaza-Garcia, 914 F.2d 345, 347-48 (1st Cir. 1990) (Breyer, C.J.); United States v. Martinez-Rios, 143 F.3d 662, 675-76 (2d Cir. 1998); United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1994); United States v. Lavoie, 19 F.3d 1102, 1104 (6th Cir. 1994); United States v. Wallace, 32 F.3d 1171, 1174-75 (7th Cir. 1994); United States v. Robinson, 20 F.3d 270, 273 (7th Cir. 1994); United States v. Weaver, 161 F.3d 528, 530 (8th Cir. 1998); and United States v. Osuna, 189 F.3d 1289, 1295 (10th Cir. 1999).

220 (2005), rendered the Guidelines advisory only. But the Third Circuit has held that "th[e Knight] presumption applies even in the *post*-Booker context." United States v. Porter, 413 Fed. Appx. 526, 530 (3d Cir. 2011) (unpublished) (emphasis in original; citing United States v. Wood, 486 F.3d 781, 790-91 (3d Cir. 2007)). And that makes eminent sense, given the central role that the Guidelines continue to play in federal sentencing even post-Booker. See generally Peugh v. United States, 133 S. Ct. 2072, 2083 (2013).

2. The Tenth Circuit's decision in *Sabillon-Umana*.

In Sabillon-Umana, the Tenth Circuit was likewise confronted with a plain Guideline application error. Writing for that court, Judge Gorsuch (joined by Judge Murphy and D.C. Circuit Judge Sentelle, sitting by designation) explained why the "affected substantial rights" prong of plain-error review was satisfied:

> Both before and after [Booker], this court has recognized that an obvious misapplication of the sentencing guidelines will usually satisfy the third and fourth elements of the plain error test. Other circuits have reached similar conclusions or even adopted an explicit presumption that a clear guidelines error will satisfy the latter two steps of plain error review.[5]
>
> This presumption is sound. If the guidelines form the essential starting point in any federal sentencing analysis (and they do), it follows that an obvious error in applying them "runs the risk of affecting the ultimate sentence ***regardless of*** whether the court ultimately imposes a

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[5] Here, the Tenth Circuit cited: United States v. Vargem, 747 F.3d 724, 728-29 (9th Cir. 2014); United States v. Wernick, 691 F.3d 108, 117-118 (2d Cir. 2012); United States v. Slade, 631 F.3d 185, 191-92 (4th Cir. 2011); United States v. Story, 503 F.3d 436, 440-41 (6th Cir. 2007); United States v. Baretz, 411 F.3d 867, 877 & n.7 (7th Cir. 2005); and Knight, 266 F.3d at 206-07 & n.7 (3d Cir.).

> sentence within or outside [the] range" the guidelines suggests. As the Third Circuit has well said: "[I]t is beyond cavil that the Guidelines are intended to, and do, affect sentencing. Indeed, that is their very raison d'être." In the language of plain error's third prong, the whole point of the guidelines is to affect the defendant's "substantial rights" by guiding the district court's analysis of how much of his liberty he must forfeit to the government. When the court's starting point is skewed a "reasonable probability" exists that its final sentence is skewed too.

Sabillon-Umana, 772 F.3d at 1333 (citations omitted; all alterations in Sabillon-Umana).

After concluding that a presumption should likewise apply with respect to the fourth prong of plain-error review, see id. at 1333-34, the Tenth Circuit concluded that

> [a] presumption that the third and fourth prongs are met by obvious guidelines errors is, thus, sensible and consistent with the terms of those tests, our case law, and the law of other circuits. It has other rule of law virtues too. It provides more certain guidance to the parties than a renewed balancing test in each and every case and it allows more expedition in error correction: knowing that obvious guidelines errors are presumptively subject to correction should enable the parties to agree to their prompt resolution in the district court without the necessity of a lengthy appeal like the one before us.

Id. at 1334 (footnote omitted).

C. The Court should grant certiorari to resolve the circuit split over whether a plain Guideline error that results in the application of an incorrect Guideline range should be presumed to have affected the defendant's substantial rights.

As these decisions highlight, there are compelling reasons to apply a presumption of prejudice to plain errors that result in the application of an incorrect Guideline range to a defendant. First, given the continuing centrality of the Sentencing Guidelines to federal sentencing even post-Booker, there is at least a reasonable probability that

application of an erroneous Guideline range will affect the district court's choice of sentence. See Sabillon-Umana, 772 F.3d at 1333. Indeed, this Court recognized as much in Peugh when it held, for purposes of the Ex Post Facto Clause, that even where sentencing guidelines are advisory, a higher guideline range "create[s] a significant risk that [the defendant] w[ill] receive a higher sentence." Peugh, 133 S. Ct. at 2083 (footnote omitted); see also id. at 2083-84, 2088.

Second, even though the Guidelines are likely to affect a district court's choice of sentence, it is unlikely that a court applying what it thinks is the correct Guideline range will make any comments shedding light on how it might sentence under a ***different, lower*** Guideline range. Indeed, in the Fifth Circuit, where this case arose, district courts have long been admonished that "[w]hen the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation [of the sentence] is required." United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005). But, as the Third Circuit has noted, "absent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the effect of an erroneous Guidelines range." Knight, 266 F.3d at 207. That is why "an error in application of the Guidelines that results in use of a higher sentencing range should be presumed to affect the defendant's substantial rights." Id.

The Fifth Circuit's refusal to adopt the presumption endorsed by the Third and Tenth Circuits had very real consequences for Mr. Molina-Martinez. Given the plain

error resulting in the use of the incorrect Guideline range (77 to 96 months, instead of the correct range of 70 to 87 months), Mr. Molina-Martinez would have been entitled to resentencing in the Third and Tenth Circuits. But, because he could not point to a "fortuitous comment by the sentencing judge on the record," Knight, 266 F.3d at 207 – probably because the district court viewed the sentencing as a rather rote imposition of the bottom of the range that (it believed) the Guidelines recommended – Mr. Molina-Martinez received no redress in the Fifth Circuit for the obvious Guideline calculation error in his case.[6]

In addition to this split of authority, the question of the proper application of the third prong of plain-error review to Guideline application errors is an important question that arises daily in the federal courts of appeals. Moreover, the presumption of prejudice adopted by the Third and Tenth Circuits (and rejected by the Fifth Circuit) arises from a suggestion made by this Court in Olano – a suggestion that the Court has not elaborated upon or elucidated in the more than 20 years since Olano was handed down. The courts of appeals would be benefited in their application of plain-error review generally by this

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[6] Nor is Mr. Molina-Martinez's an isolated case. The Fifth Circuit's jurisprudence is replete with examples of plain Guideline errors where the defendant received no relief on plain-error review, because he could not muster "additional evidence" that the application of the wrong Guideline range affected his sentence. See, e.g., United States v. Sweet, 579 Fed. Appx. 277, 278 (5th Cir. 2014) (unpublished); United States v. Blocker, 612 F.3d 413, 416-17 (5th Cir. 2010); United States v. Del Campo-Ramirez, 379 Fed. Appx. 405, 408-10 (5th Cir. 2010) (unpublished); United States v. Jones, 596 F.3d 273, 277-79 (5th Cir. 2010); cf. United States v. Jasso, 587 F.3d 706, 713-14 (5th Cir. 2009) (alternative holding).

Court's further exploration of that point.[7]

For the foregoing reasons, this Court should grant certiorari in this case.

[7] The proper interpretation and administration of the plain-error rule is unquestionably of exceptional importance to the administration of justice in federal criminal cases. That is why, as the United States stated in a successful attempt to persuade the Court to grant certiorari, "[i]n recent years, this Court frequently has been required to explicate plain-error analysis in criminal cases." Petition for Certiorari, United States v. Marcus, No. 08-1341 (May 1, 2009), at 19 (citations omitted), cert. granted, 558 U.S. 945 (2009), decision below reversed, 560 U.S. 258 (2010).

CONCLUSION

For the foregoing reasons, petitioner Saul Molina-Martinez prays that this Court grant certiorari to review the judgment of the Fifth Circuit in this case.

Date: March 16, 2015

Respectfully submitted,

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588 Fed.Appx. 333
(Cite as: 588 Fed.Appx. 333)

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This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.

United States Court of Appeals,
Fifth Circuit.
UNITED STATES of America, Plaintiff–Appellee
v.
Saul MOLINA– MARTINEZ, Defendant–Appellant.

No. 13–40324.
Dec. 17, 2014.

Paula Camille Offenhauser, Assistant U.S. Attorney, Renata Ann Gowie, Assistant U.S. Attorney, Anna Elizabeth Kalluri, Assistant U.S. Attorney, U.S. Attorney's Office, Houston, TX, for Plaintiff–Appellee.

Marjorie A. Meyers, Federal Public Defender, Timothy William Crooks, Assistant Federal Public Defender, Margaret Christina Ling, Assistant Federal Public *334 Defender, Federal Public Defender's Office, Houston, TX, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 1:12–CR–848–1.

Before STEWART, Chief Judge, and JONES and HIGGINSON, Circuit Judges.

PER CURIAM: FN*

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Saul Molina–Martinez pleaded guilty, without the benefit of a plea agreement, to being illegally present in the United States following deportation, having been convicted of an aggravated felony. 8 U.S.C. §§ 1326(a), (b). The district court sentenced Molina–Martinez to 77 months in prison, at the bottom of the 77 to 96 month Sentencing Guidelines range set forth in the presentence report, and to a three-year term of supervised release. For the first time on appeal, Molina–Martinez argues that the district court erred in calculating his criminal history category, and that the correct Guidelines range should have been 70 to 87 months. Because he did not object on this ground in the district court, we review the claim for plain error. *See United States v. Mudekunye,* 646 F.3d 281, 289 (5th Cir.2011). Molina–Martinez must show an error that is clear or obvious and that affects his substantial rights. *See Puckett v. United States,* 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). If he makes such a showing, we have the discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.*

Under the Sentencing Guidelines, prior sentences are counted as a single sentence if they were imposed on the same day, unless the "offenses ... were separated by an intervening arrest (*i.e.,* the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2(a)(2). Molina–Martinez committed four aggravated burglaries in Tennessee in May 2009, and he committed a fifth aggravated burglary and a theft in May 2010. His first arrest for any of these offenses occurred in June 2010. The probation officer imposed a total of nine criminal history points for three of these offenses pursuant to U.S.S.G. § 4A1.1(a) and two additional points for the uncounted offenses under § 4A1.1(e), resulting in a total of 18 criminal history points and a criminal history category of VI. However, because there was no in-

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tervening arrest between the Tennessee burglaries, Molina–Martinez should have received only a total of 12 criminal history points, which results in a criminal history category of V. The correct calculation would have reduced Molina–Martinez's Guidelines range from 77–96 months to 70–87 months. The government concedes this error. Molina–Martinez therefore has shown a plain or obvious error in the criminal history calculation. *See Puckett,* 556 U.S. at 135, 129 S.Ct. 1423.

Molina–Martinez has not, however, established that the error affected his substantial rights. Molina–Martinez must "show a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence." *United States v. Garcia–Carrillo,* 749 F.3d 376, 379 (5th Cir.2014) (internal quotation marks and citation omitted).[FN1] The district court imposed *335 a prison sentence of 77 months, which is at the bottom of the Guidelines range applied by the court and in the middle of the properly calculated range. "[W]hen the correct and incorrect ranges overlap *and the defendant is sentenced within the overlap,* 'we do not assume, in the absence of additional evidence, that the sentence affects a defendant's substantial rights.' " *Mudekunye,* 646 F.3d at 290 (emphasis in original) (quoting *United States v. Blocker,* 612 F.3d 413, 416 (5th Cir.2010)). Thus, because his sentence fell within both the correct and incorrect Guidelines range, Molina–Martinez acknowledges that our controlling caselaw obliges him to point to "additional evidence" in the record, other than the difference in ranges, to show an effect on his substantial rights. *United States v. Pratt,* 728 F.3d 463, 481–82 (5th Cir.2013). Record evidence that the Guidelines range was a "primary factor" in sentencing may be sufficient "additional evidence." *Id.* at 482. In *Pratt,* the district court affirmatively stated on the record that it felt a within-Guidelines sentence was appropriate and that it was choosing a sentence in the middle of the Guidelines range; we noted that this was evidence that the Guidelines range was a primary factor in sentencing. *Id.*[FN2]

FN1. Although Molina–Martinez contends that an error in the Guidelines calculations should be considered presumptively prejudicial, he concedes that the issue is foreclosed by our precedent and raises the argument only to preserve it for further review.

FN2. The court noted also in *Pratt* that there was uncertainty whether an overlap existed at all between the Guidelines range utilized and the correct range. *See Pratt,* 728 F.3d at 482.

Molina–Martinez has not shown additional evidence that the sentence affected his substantial rights. The mere fact that the court sentenced Molina–Martinez to a low-end sentence is insufficient on its own to show that Molina–Martinez would have received a similar low-end sentence had the district court used the correct Guidelines range. *See United States v. Jones,* 596 F.3d 273, 279 (5th Cir.2010). The district court made no explicit statement suggesting that the Guidelines range was a primary factor in sentencing. Neither the parties' anchoring of their sentencing arguments in the Guidelines nor the district court's refusal to grant the government's request for a high-end sentence of 96 months is "additional evidence" that the sentence affected Molina–Martinez's substantial rights. Accordingly, Molina–Martinez has not established plain error warranting reversal by this court. *See Puckett,* 556 U.S. at 135, 129 S.Ct. 1423. The judgment of the district court is AFFIRMED.

C.A.5 (Tex.),2014.
U.S. v. Molina-Martinez
588 Fed.Appx. 333

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